

TANZANIA / JUDGMENT

nassoro erasto mlowe another vs prosper lyaruua 2024 tzca 143 29 february 2024

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVIL APPLICATION NO. 508/17 OF 2021 NASSORO ERASTO M LOWE..... 1st APPLICANT
RIZIKIISAYA..... 2nd APPLICANT VERSUS PROSPER LYARUU.....RESPONDENT (Application for extension of time to serve copies of notice of appeal against the judgment and decree of the High Court (Land Division) at Dar es Salaam) (Ngngelp, J.) dated the 16th day of December, 2019 in Land Appeal No. 29 of 2018

RULING

19th & 29th February, 2024 MWANDAMBO. 3.A.: The applicants who act through Mr. Juma Nassoro, learned advocate, have moved the Court for an order extending time to serve the respondent with a copy of a notice of appeal from the decision of the High Court Land Division in Land Appeal No. 29 of 2018 in which they lost to the respondent. The application is predicated upon rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) raising only one ground behind the application, that is to say, mistaken belief that they had already served a copy of the notice of appeal on the respondent. In support of the application, the applicants have taken out an affidavit containing 7 paragraphs largely a narration of what transpired between the lodging of their notice of appeal and discovery of failure to serve the copy on the respondent. ... - ' ' ■ ! ■ ;h:'- The respondent who enjoys the services of Mr. Sylvester Shayo, learned advocate did not file an affidavit in reply. Nevertheless, Mr. >^ • -1 p i ' i Shayo appeared before me when the application was called on for hearing to oppose the application. The substance of Mr. Nassoro's oral arguments during the hearing was a restatement of the averments in the affidavit in particular, paras 5, 6 and 7 thereof alluding to inadvertence to serve the copy on the respondent. The averments in the 3 paragraphs are to the effect that, at all material time after lodging the notice of appeal on 27 December, 2019, the applicants had a bonafide belief that they had already served the respondent with a copy of the notice of appeal until 15 March 2020. That is the date on which they discovered that a copy was yet to be served. Upon such discovery, they filed Civil Application No. 79/17 of 2020 for extension of time to serve a copy of the notice of appeal which they subsequently withdrew on 15 September 2021. Hence, the instant application lodged on 21 October 2021. Considering the applicants' fate, the learned advocate implored me to exercise

leniency in determining the application taking into account that they have already instituted the appeal. Mr. Shayo was unmoved by the applicants' reasons for the delay urging the Court to decline exercising discretion in their favour. The learned advocate was firm that, leniency has never been a factor in exercising the Court's discretion for extension of time to take a step in the proceedings. On the contrary, it was urged, and rightly so in my view, to succeed, the applicant must show good cause behind the delay in serving a copy of the notice within the prescribed time. In his further submission, Mr. Shayo pointed out several aspects which place the applicants outside the ambit of rule 10 of the Rules. One, failure to explain the alleged inadvertence in the affidavit and even if that was the case, the notice of appeal was prepared and lodged by the applicants but their advocate; two, failure to explain the delay between the date the first application was withdrawn to 21 October 2021 when the instant application was filed. He thus invited me to dismiss the application for failure to account for the delay. Countering the submissions by the respondent's advocate, Mr. Nassoro stated from the bar that the applicants could not lodge the instant application immediately due to the delay in obtaining a copy of the order withdrawing the previous application which was not obtained until 12 October 2021. Whilst conceding that it was him who prepared and lodged the notice of appeal, he contended that, it is the applicants who were responsible for serving the said copy on the respondent. Finally, counsel urged that, failure to serve the copy was a result of human error which should not be visited on the applicants. I have heard rival arguments in the light of the ground set out in the notice of motion and the averments in the founding affidavit. As alluded to earlier, the respondent did not file an affidavit in reply and so, as submitted by Mr. Nassoro, those averments stand unopposed. However, Mr. Shayo pointed out that the fact that the respondent did not file an affidavit in reply should not be taken to be an admission unless such averments meet the threshold under rule 10 of the Rules. It is significant that, rule 10 vests discretion on the Court to extend time for the doing of any act permitted by the Rules or by an order of the Court upon good cause being shown. The duty to serve a copy of the notice on the respondent was cast upon the applicants by rule 84 (1) of the Rules before or within 14 days after the lodging of the notice of appeal. That means, the applicants had an option to serve the respondent with a copy of the notice before it was lodged in Court. They opted to do so after which had to be done not later than 14 days from the date of lodgement which they failed to do. Although they knew of their duty to serve, they claim that they mistakenly believed that they had already served the notice. It is trite law for which no authority will be required that, a party who moves the Court to exercise its discretion under rule 10 of the Rules must explain, not only the reason for the delay but he must also account for each day of such delay. Although the reason for the delay in doing so may not necessarily be valid as well as the explanation on the delay, it needs no emphasis that what is required for the purpose of the rule is not just any reason but a valid reason. It has been shown above that the reason for the delay in this application was human error attributed to by inadvertence and mistaken belief. Mr. Shayo discounted such reason as outside the parameters of factors for the Court's exercise of discretion under rule 10 of the Rules. Be it as it may, the issue for my consideration is, granted that the delay was attributed to by a valid reason, have the applicants accounted for delay each day of the delay? The period prescribed for serving a notice of appeal under rule 84

(1) of the Rules is 14 days. The notice of appeal under consideration was lodged on 27 December 2019 but it took the applicants nearly 3 months to realise that they had not served the respondent. Mr. Nassoro stated from the bar that although it is him who prepared and lodged the notice of appeal, the duty to serve the notice was on the applicants themselves. With respect, that statement is good from far but far from being good considering that it is not part of the averments in the affidavit. At any rate, there is nothing from the affidavit explaining the date on which the applicants received the copy of the notice of appeal from their advocate for service on the respondent. All we have on record is the date of filing and the date the applicant claim that they realized that they had not served a copy on the respondent. There is nothing to explain what made the applicants realize the failure to serve the copy on the said date. The above will be enough for the first period of the delay. The second period started from 15 September 2021 when the first application was marked withdrawn to 21 October 2021, the date on which the instant application was filed. That period is in excess of a month and Mr. Shayo strongly submitted that no explanation has been given to account for such delay. Despite Mr. Nassoro's attempt to explain it away, there is no such explanation on the delays in obtaining a copy of the order marking the previous application withdrawn. Mr. Nassoro's statement from the bar cannot suffice and I reject it. At any rate, I am unable to appreciate why could it have taken so long a time to obtain a simple order from the Court. Even if I were to accept such an explanation, the applicants have not accounted for 9 days from the date they obtained a copy of the order to the date of filing the instant application. Besides, it has not been suggested and I know no law requiring a litigant to annex to his application for extension of time an order making his previous application withdrawn unless the order granted the applicants leave to file a fresh application. This is not the case here and I am surprised why the applicants found it necessary to wait for a copy of the order signed on 15 September, 2021 to 12 October, 2021 to collect it. There is no explanation that the order could not have been obtained well before 12 October 2021. Despite Mr. Nassoro's urging that I exercise leniency in this application on account of human error, I find myself constrained to disagree with him guided by well-established principles for the exercise of discretion particularly in applications for extensions of time such as this one. One of such well cherished principles is that the Court's discretion must be exercised judiciously as opposed to capriciousness. In *Daud s/o Haga v. Jenitha Abdon Mchafu** Civil Application No. 19 of 2006 (unreported), the Court cited with approval extracts in the works of Rustom ji, Law o f Lim itation 5th edition to which Sir Ralph Windham, CJ referred in *Daphne Parry v. Murray Alexander Carson*

[1963] EA 546 thus: "It does not seem ju st that an applicant who has no valid excuse fo r failure to utilize the prescribed time, but tardiness, negligence or ineptitude o f counsel should be extended extra tim e m erely out o f sym pathy for his cause." That means that that, sympathy and equity are matters which cannot be taken into account in exercising discretion for extension of time. See also: *Mwita S/o Mhere v. Republic*, [2005] T.L.R. 107, *Hashim Juma Napepa & Another v. Bakari Ahmad Ng'itu & Another*, Civil Application No. 07/07 of 2022 (unreported). The upshot of the foregoing is that the applicants have not met

the threshold to warrant me exercise my discretion in their favour under 8 rule 10 of the Rules. I thus find no merit in the application and dismiss it with costs. It is so ordered. DATED at DAR ES SALAAM this 28th day of February, 2024. L. J. S. MWANDAMBO JUSTICE OF APPEAL The Ruling delivered this 29th day of February, 2024 in the presence of Mr. Gabriel Munishi, learned counsel holding brief for Mr. Juma Nassoro, learned counsel for the applicants and Mr. Sylvester Shayo, learned counsel for the respondent; is hereby certified as a true copy of the original. |\ ■vr^ /\>IUl£UW* A. S. CHUGULU . \ \ DEPUTY REGISTRAR | COURT OF APPEAL 9

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